TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

• Cases or authorities chiefly relied upon are marked by asterisks.

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS:

LEGISLATIVE MATERIALS:

• Cases or authorities chiefly relied upon are marked by asterisks.

TABLE OF AUTHORITIES—Continued

* Cases or authorities chiefly relied upon are marked by asterisks.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. ——

AMERICAN BROADCASTING COMPANIES, INC., CBS INC., METROMEDIA, INC. and NATIONAL RADIO BROADCASTERS ASSOCIATION,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*,
Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Broadcasting Companies, Inc., CBS Inc., Metromedia, Inc. and the National Radio Broadcasters Association hereby jointly petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment of June 29, 1979, in *WNCN Listeners Guild* v. *Federal Communications Commission*, Nos. 76-1692, 76-1793 and 77-1951.

We understand that the Federal Communications Commission and the United States are also petitioning for certiorari to review the court of appeals' decision.

OPINIONS BELOW

The opinion of the court of appeals, not yet officially reported, appears as Appendix A of the petition of the Federal Communications Commission and the United States.[1] The opinions of the Federal Communications Commission are reported at 60 FCC 2d 858 (1976) and 66 FCC 2d 78 (1977) and appear as Appendices D and E, respectively, of the Government's petition.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. On September 21, 1979, the time for filing this petition was extended to November 26, 1979, in an Order signed by Mr. Chief Justice Burger. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Since the very beginning of broadcast regulation the selection of the informational and entertainment program formats of radio broadcast stations has been entrusted to individual licensee discretion, responding to the needs of the listening audience and the competitive conditions of the marketplace. Following a comprehensive policy and fact-finding inquiry, the Commission determined that public interest and First Amendment goals would be best served by maintaining this long-standing regulatory approach.

The question presented is whether, by ordering the Commission to regulate in this area, the court of appeals acted contrary to the purposes of the Communications Act, usurped the Commission's administrative discretion,

[1] References to the court of appeals' opinion will be cited herein to the material appended to the Government's petition, as "FCC App. A at ——."

and mandated a form of regulation that violates the First Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First Amendment to the Constitution of the United States, and Sections 3(h), 303(g), 308, 309(a), 310(d), 315(a), 326 and 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 153(h), 303(g), 308, 309(a), 310(d), 315(a), 326 and 402(b). These constitutional and statutory provisions are set forth in an Appendix to this petition.

STATEMENT OF THE CASE

This case concerns the extent to which the Government should regulate changes in the program content of individual radio station licensees. The material selected and the manner in which such material is presented constitute a station's program format, which is utilized to attract and maintain listeners.[2] The selection and implementation of program formats is a dynamic process:

> "Radio station formats are infinite in variety and subject to constant reappraisal and change. A *formula* that stresses progressive rock music today may, by a quick decision of the programmer, feature rhythm and blues music tomorrow. A different announcer or staff of announcers can change the personality of a station almost overnight. A changed configuration of news programs on a given station may suddenly change that station's total impact on an audience. Format changes are frequently made on

[2] The dramatic growth in the number of radio stations (from 583 in 1934 to 8,654 in 1979) and the concomitant surge in radio specialization has produced a great number of different entertainment and informational formats. *See Inquiry and Proposed Rulemaking: Deregulation of Radio*, 44 Fed. Reg. 57,636, 57,646-48 (1979).

the basis of educated hunches, abstract guesses, competitive station activities, and mere whims." [3]

This case also involves sharp and continuing policy differences between the lower appellate court and the Federal Communications Commission.

Over the course of more than forty years of broadcast regulation, the artistic and journalistic content of individual station program formats was entrusted to licensee discretion and marketplace conditions. Indeed, no rule or general policy was ever promulgated by the Commission to regulate radio program formats. This pattern and practice was pierced, however, by a series of adjudicatory decisions that commenced in 1970 [4] and culminated four years later in an *en banc* decision of the Court of Appeals for the District of Columbia Circuit in *Citizens Committee to Save WEFM* v. *FCC*, 165 U.S. App. D.C. 185, 506 F.2d 246 (1974) (hereinafter "*WEFM*"). Applying general statutory language from the Communications Act of 1934—*i.e.*, the "public interest" standard of Sections 309(a) and 310(d) and the general provision of Section 303(g) authorizing the agency to "encourage the larger and more effective use of radio . . ."—the *WEFM* court directed the Commission to reverse its historical course and to begin active over-

[3] E. Routt, J. McGrath, & F. Weiss, The Radio Format Conundrum, p. 1 (1978) (emphasis in original). While a station's initial format is usually developed to fill a specific programming void in a particular radio market, "once the decision has been made to program contemporary music, country music, ethnic music, all-news, all-talk or adult music, the format may, and likely will, be subjected to a dozen subtle or obvious shifts and adjustments." *Id.*

[4] *Citizens Comm. to Preserve the Voice of Arts in Atlanta* v. *FCC*, 141 U.S. App. D.C. 109, 436 F.2d 263 (1970); *Hartford Communications Comm.* v. *FCC*, 151 U.S. App. D.C. 354, 467 F.2d 408 (1972); *Lakewood Broadcasting Serv., Inc.* v. *FCC*, 156 U.S. App. D.C. 9, 478 F.2d 919 (1973); *Citizens Comm. to Keep Progressive Rock* v. *FCC*, 156 U.S. App. D.C. 16, 478 F.2d 926 (1973).

sight of format changes in license assignment situations. Under *WEFM*, when the Commission is faced with an assignment application that includes a proposed change in program format, and there is significant public grumbling, it must determine whether the format to be altered is unique or otherwise serves a specialized audience that would somehow experience its loss. If the so-called "endangered" format fits this description, the Commission must conduct a public inquiry (which may include a full-scale evidentiary hearing) for the purpose of determining whether proposals to change the program format of the radio station being assigned would be consistent with the public interest.

Agency Proceedings

Because all previous decisions leading to *WEFM* had occurred in an adjudicatory context that did not permit an opportunity to explore general marketplace conditions and the First Amendment consequences of format regulation, the Commission initiated a general public inquiry on December 22, 1975. This was, therefore, the Commission's first comprehensive review of the various practical and policy facets involved in the direct and detailed regulation of radio station entertainment and informational formats.

In July 1976, after reviewing comments from numerous broadcasters and public interest representatives, the Commission issued a policy statement, *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C. 2d 858 (1976) ("*Policy Statement*"), which concluded that the regulation of programming required by *WEFM* was inconsistent with the policy Congress had adopted for broadcasting under the Communications Act of 1934, presented insoluble practical application problems, and represented an impermissible intrusion into programming practices protected by the First Amendment. Moreover, the Commission found compelling evidence that a highly

competitive radio marketplace was producing substantial programming diversity without regulatory intervention.

The Decision Below

This petition seeks review of an *en banc* decision of the court of appeals holding that the Commission's 1976 *Policy Statement* is "unavailing and of no force and effect." (FCC App. A at 40a). Judge McGowan, writing for the majority, reaffirmed the court's *WEFM* holding that the Commission must scrutinize proposed format changes in transfer applications. Relying on the same broad "public interest" statutory language cited in *WEFM* (but not on Section 303(g)), the majority opinion below also substantially broadened *WEFM* by requiring that the same format policy be applied to license renewal applications (FCC App. A at 20a).

The majority opinion was critical of the Commission for having challenged the court's statutory interpretation, and denied that the court of appeals was making agency policy. While acknowledging that the Commission possessed a special expertise concerning the intricacies of radio broadcasting and was better equipped to develop legislative-type facts concerning the radio marketplace (FCC App. A at 27a, 34a), the court nevertheless engaged in its own policy analysis to determine whether competition among radio stations would provide program diversity as well or better than government regulation.[5]

[5] With respect to the Commission's general examination of marketplace conditions, the court admonished the agency for not specifically providing an opportunity for public comment on one aspect of that examination—a statistical table developed by the Commission's staff from widely available trade sources that set forth the number of radio stations utilizing certain format categories in the 25 largest metropolitan markets. The court, however, specifically declined to reject the Commission's *Policy Statement* on this ground (FCC App. A at 17a n.24), and did not remand this matter to the agency for further proceedings.

Throughout its opinion the court of appeals repeatedly chastised the Commission for its "deep-seated aversion to the decisions of this court (and to the advocates of those decisions)"; its "less than enthusiastic cooperation" (FCC App. A at 21a); its desire to achieve a "circumvention" of the court's *WEFM* decision (FCC App. A at 22a); and its "history of at least passive resistance to the format decisions in the name of licensee freedom." (FCC App. A at 34a n.51). Evidently the court of appeals believed that all of the issues had been settled by its previous decisions, even though the constitutional issues had not even been briefed or argued.

Finally, in dismissing the Commission's analysis of the adminstrative difficulties and sensitive First Amendment concerns as "little more than a dream" (FCC App. A at 18a) and a "highly-colored portrait" (FCC App. A at 24a), the court sharply criticized the Commission for failing to develop administrative standards that would minimize the intrusive features of *WEFM* (FCC App. A at 27a).

In a concurring opinion, Judge Bazelon expressed concern that the majority opinion hampered the Commission's legitimate policy-making role and failed to "grapple seriously" with the constitutional implications of its holding. (FCC App. A at 42a). In a dissenting opinion, Judge Tamm, joined by Judge MacKinnon, declared that the majority's decision "usurps the proper role of the Federal Communications Commission . . . in the formulation of communications policy." (FCC App. A at 46a). Citing several instances where, in its view, the majority had substituted its own radio marketplace theories for Commission findings, the dissenting opinion concluded that, by disregarding the Commission's expert knowledge and policy-making role, the majority decision below violated this Court's mandate in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

REASONS FOR GRANTING THE WRIT

This is the fourth major case to come before this Court in the past decade concerning FCC regulation in the sensitive area of program content. In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the Court upheld the constitutionality of the Commission's fairness doctrine and personal attack rules. In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) ("*CBS* v. *DNC*"), the Court reversed a decision of the District of Columbia Circuit finding that the Commission was required to establish regulations permitting "access" for editorial advertising. This Court held that neither the Communications Act nor the First Amendment required the Commission to engage in such regulation, and recognized the fundamental principle that broadcast licensees, not the Commission, are charged with the task of selecting broadcast programming.[6] In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), while ruling that the FCC could properly prohibit the broadcast of repeated indecent language in the early afternoon hours on radio, the Court made clear again that more extensive regulation of program content raises the most serious First Amendment questions.

The present case again involves the necessity and appropriateness of Commission regulation of licensee program choice. The fundamental question presented is whether the Commission is required to regulate changes in radio formats or whether it may leave such decisions to individual station licensees acting as public trustees. Thus, the present case, like *CBS* v. *DNC*, involves the question of whether the Court of Appeals for the District of Columbia Circuit properly ordered the Commission to engage in program content regulation, when the Commission determined that such regulation would be contrary to the Communications Act and the First Amendment.

[6] In *FCC* v. *Midwest Video Corp.*, —— U.S. ——, 99 S. Ct. 1435 (1979), the Court made clear that such regulation would not be permissible under the Communications Act.

Unquestionably, the decisions of the court of appeals requiring such regulation represent a radical departure from traditional standards. As the Commission has observed, "[f]or over forty years broadcasting applicants have been free to select their own program formats."[7] Consistent with that tradition and based on its long experience in administering the governing statute, the Commission has concluded that regulation of radio formats would be contrary to both the purposes of the Communications Act and the First Amendment because it would deprive licensees of the opportunity to determine what programming best serves the interests of the listening audience.[8] The court of appeals substituted its policy judgment for that of the Commission with respect to the need to undertake regulation of radio program formats without any statutory support except the court's invocation, as a talisman, of the Communications Act's concern for the "public interest." In reprimanding the Commission for its "deep-seated aversion"[9] to the recent decisions of the court of appeals, the court below failed to give adequate weight to the Commission's interpretation of the public interest standard.[10] As this Court stated in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), "the weighing of policies under the

[7] *Notice of Inquiry: Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C. 2d 580, 585 (1976).

[8] *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C. 2d 858 (1976).

[9] FCC App. A at 21a.

[10] As this Court has repeatedly held, the long-standing construction of a statute by an agency charged with its execution is entitled to great weight. *See Red Lion*, 395 U.S. at 381; *Zemel* v. *Rusk*, 381 U.S. 1, 11-12 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965).

'public interest' standard is a task that Congress has delegated to the Commission in the first instance . . . ." [11]

The statutory and constitutional questions presented in this case are important to the future of broadcast radio. In order to compete most effectively and to respond to the changing demands of their audience, individual broadcasters often change their formats—such as from classical to popular, from one type of popular music to another, or from an entertainment format to all-news radio.[12] The court of appeals' decision makes clear that the regulatory requirements which it imposed are applicable to format changes occurring either when a license is assigned or when the existing owner makes a judgment that his audience would be better served by a different format and this change is placed in issue at renewal time.[13] Thus, this case involves the standards applicable to all changes in broadcasting formats undertaken by radio licensees.

The court of appeals' decision is also important because it could hamper the Commission's efforts to "deregulate" broadcast radio. For several years the Commission has raised the question of whether its regulatory activities

[11] 436 U.S. at 810.

[12] As noted above, such shifts are accomplished not only by discrete and clearly perceptible format revisions, but also by gradual shifts in talent or content within particular programs or blocks of time.

[13] FCC App. A at 20a. The court below attempted to minimize the scope of that decision by averring, for example, that the *WEFM* policy does not allow the Commission to "dictate adoption of a new format [or] force retention of an existing format. . . ." FCC App. A at 25a-26a. There can be no question that the decision under certain circumstances would "force retention of an existing format. . . ." Moreover, there is reason to believe that logically, at least, it may extend even further. For instance, while neither the Commission nor the court of appeals addressed the question, the logic of the court's decision might require that a new applicant proposing a unique format be given preference over an existing licensee offering a non-unique format.

in broadcast radio are justified, particularly in light of the large number of radio broadcast stations which exist throughout the United States. The culmination of the Commission's consideration of this issue has been a recent notice of proposed rulemaking initiating a proceeding which is likely to continue for several years.[14] There, the Commission proposes to eliminate virtually all agency standards as to the overall quantities of news, information and advertising matter broadcast by radio licensees.[15] The Commission's basic deregulation theory, like the theory of its format policy, is that the marketplace provides adequate incentives and restraints to promote diversity. The decision of the court of appeals may well be urged to cast doubt upon the Commission's ability to consider fresh regulatory alternatives in the radio broadcast area, or to place reliance on the operation of the market.

The questions presented in this case are unlikely to arise in any other circuit. Since the licensing decisions affected by the court's policy can only be appealed to the United States Court of Appeals for the District of Columbia Circuit under Section 402(b) of the Communications Act, 47 U.S.C. § 402(b), it is highly unlikely that any other court of appeals will be able to consider the issues in this case, and thus there is no significant possibility of a conflict in the circuits that could generate further review by this Court.

Finally, the case is important because the decision below reflects a continuing misunderstanding by the court of appeals of the regulatory responsibilities of the Federal Communications Commission, a misunderstanding

[14] *Inquiry and Proposed Rulemaking: Deregulation of Radio*, 44 Fed. Reg. 57,636 (1979).

[15] The Commission does not propose to eliminate the fairness doctrine or the political broadcasting rules as applied to radio.

which was also reflected in the court of appeals' decisions in *CBS* v. *DNC* and in *NCCB*.[16]

We briefly discuss below the error of the court of appeals' ruling, and other reasons why this Court should grant certiorari.[17]

I. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS DECIDED AN IMPORTANT STATUTORY QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

Unlike the fairness doctrine upheld by this Court in *Red Lion Broadcasting Co.* v. *FCC*, which originated with the Commission and is specifically prescribed by the Com-

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[16] *National Citizens Comm. for Broadcasting* v. *FCC*, 181 U.S. App. D.C. 1, 555 F.2d 938 (1977), *rev'd*, 436 U.S. 775 (1978).

[17] As discussed in note 5, *supra*, the court of appeals criticized the Commission for its reliance on a staff study depicting the degree of diversity in broadcasting because the study was not made available for comment. The court, however, did not rely on this alleged error as a ground for reversing the Commission and did not remand to the agency in order to cure the procedural defects it detected. In any event, the alleged procedural defects regarding the staff study would not have been sufficient to warrant the court of appeals' rejection of the *Policy Statement*. No one has advanced any substantive objections to the study or explained how such objections might have dissuaded the Commission from relying on the study. In one of the cases relied on by the court of appeals in criticizing the Commission, the court said:

> "[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made . . .; it must show why the mistake was of possible significance in the results . . . ." *Portland Cement Ass'n* v. *Ruckelshaus*, 158 U.S. App. D.C. 308, 327, 486 F.2d 375, 394 (1973), *cert. denied*, 417 U.S. 921 (1974).

munications Act,[18] the format change requirement adopted by the court of appeals originated with the court of appeals and is not a requirement of the Communications Act. The format change requirement represents nothing more and nothing less than a policy judgment by the court of appeals that such regulation would be desirable in the public interest. Indeed, the only provision of the statute relied on by the court of appeals was the broad and amorphous public interest requirement,[19] a provision whose interpretation is primarily within the province of the expert agency and not a court of appeals.[20]

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[18] Section 315(a), Communications Act of 1934, as amended, 47 U.S.C. § 315(a).

[19] Sections 309(a), 310(d), Communications Act of 1934, as amended, 47 U.S.C. §§ 309(a), 310(d). The court of appeals stated:

> "The basic premise of our format cases is that the Communications Act's 'public interest, convenience and necessity' standard includes a concern for diverse entertainment programming" (footnotes omitted). FCC App. A at 4a-5a.

In *WEFM*, the court had also relied in part on Section 303(g) of the Communications Act. *See Citizens Comm. to Save WEFM* v. *FCC*, 165 U.S. App. D.C. 206, 506 F.2d 246, 267 (1974) *quoting National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216-17 (1943). Section 303(g) provides, *inter alia*, that the Commission shall "[s]tudy new uses for radio . . . and generally encourage the larger and more effective use of radio in the public interest." This Court limited the reach of Section 303(g) in *FCC* v. *National Citizens Comm. for Broadcasting*. By relying solely on the "public interest" standard as the basis of its format decisions, the court of appeals has apparently abandoned its view that the "larger and more effective use" standard of Section 303(g) specifically compels the Commission to regulate radio broadcast formats

[20] *See Bowman Transp.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 293 (1974). In addition to construing the Communication Act's "public interest" standard as not compelling format regulation, the Commission also relied on § 3(h) of the Act, 47 U.S.C. § 153(h), which provides that a broadcaster is not to "be deemed a common carrier," as being inconsistent with format regulation. 60 F.C.C.2d at 859, citing *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

The court not only failed to find any specific statutory support for its holding, it relied on no legislative history interpreting the general public interest standard to require regulation of entertainment and information formats. In fact, the legislative history runs contrary to the court of appeals' interpretation of the "public interest" standard. During the consideration of the Radio Act of 1927 by Congress, it was repeatedly suggested that the power to regulate musical formats should be granted to the proposed Federal Radio Commission since the Department of Commerce declined to regulate the type of music being broadcast by licensees, and its practice was to accord no greater preference for the "broadcast of sacred music" than for the "broadcast [of] jazz." [21] Reference was made to the existing inability of "high-class music" applicants to obtain licenses, and it was questioned whether, "on the ground that it is a matter of public interest," there "ought not to be some provision [in the new bill] to afford a better and more wholesome set of programs than sometimes exist." [22] In the House, the granting of such authority was found objectionable because it would "be almost the entering wedge to censorship," and a provision which would have granted such regulatory authority to the agency was deleted from the bill.[23] The Senate not only accepted this deletion, but

[21] *Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 37 (1926) (hereinafter *Hearings on H.R. 5589*).

[22] *Hearings on H.R. 5589* at 38.

[23] Congressman Wallace White, the author of the bill that became the basis of the Radio Act of 1927, originally sought to give the proposed Federal Radio Commission authority to prescribe "the priorities as to subject matter to be observed." H.R. 7357, 68th Cong., 1st Sess. § 1(B) (1924). Congressman White omitted this provision from the bill he introduced in the 69th Congress, H.R. 5589, 69th Cong., 1st Sess. (1926). He confirmed that no such programming priorities were authorized by the bill and that the

went further and adopted a provision barring censorship specifically.[24] This provision, now Section 326 of the Communications Act, 47 U.S.C. § 326, was incorporated in the final bill because of the extensive fears of agency censorship expressed in both Houses.[25] Thus, the legislative history of the Communications Act shows that Congress considered and specifically rejected proposals to give the Commission authority to regulate the types of music being broadcast.[26]

In keeping with that Congressional judgment, from the very beginning of its regulation of radio the Commission has carefully avoided any prescription of types of program format.[27] Thus, it refused to consider whether an applicant "placed undue emphasis on 'hillbilly' music" [28] or whether an applicant had improperly failed to continue as a "good music" station.[29] In 1956 the Commission noted that "the Commission has never imposed a definite program format as a prerequisite to an authorization for

deletion of the language granting authority had been made intentionally, "because of the fear which had been expressed by so many to me that that did confer something akin to censorship." *Hearings on H.R. 5589* at 39-40.

[24] *Hearings on S. 1 and S. 1754 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st. Sess. 121 (1926).

[25] H.R. Conf. Rep. No. 1886, 69th Cong., 2d Sess. 19 (1927).

[26] Congress has subsequently rejected proposals to amend the Communications Act to confer the authority to establish program priorities; in doing so members of Congress again made clear that they believed the Commission should not regulate licensee programming by directing that "symphonic music" be presented in preference to, say, "boggie-woogie" music. 106 Cong. Rec. 17,638 (1960) (comments of Sen. Pastore).

[27] *See* 3 Ann. Rep. FRC 17 (1929).

[28] *Richmond Newspapers, Inc.*, 11 P&F Radio Reg. 1234, 1270 n.13 (1955).

[29] *The Good Music Station, Inc.*, 23 F.C.C. 611, 620 (1957). *See generally Programming Policy Statement*, 44 F.C.C. 2303 (1960).

operation of a television or radio broadcast station." [30] In its 1960 *Programming Policy Statement*, the Commission rejected arguments for "requir[ing] licensees to present specific types of programs," [31] and stated that each "licensee must find his own path [of programming] with the guidance of those whom his signal is to serve." [32] Similarly, the Commission observed in its 1971 Ascertainment Primer:

> "Our view has been that the station's [entertainment] program format is a matter best left to the discretion of the licensee or applicant . . . ." [33]

Even after the recent court of appeals decisions, the Commission "repeatedly urged [the court of appeals] to reverse or drastically curtail the decisions." [34]

Before these recent court decisions, no court had ever required or suggested that the Commission was compelled to regulate changes in station program formats. The decisions of this Court repeatedly made plain that, apart from general responsibilities such as the fairness doctrine, licensees were primarily charged with determining the needs and interests of their audiences and making programming judgments as trustees for the public.

In ruling otherwise the court below has disregarded the teachings of a number of decisions of this Court. As this Court found in *CBS* v. *DNC*, "Congress intended to permit private broadcasting to develop with the widest

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[30] *E. Okla. Television Co.*, 14 P&F Radio Reg. 148, 149 (1956) (dictum). *See also Brush-Moore Newspapers, Inc.*, 11 P&F Radio Reg. 641, 697 (1956).

[31] *Programming Policy Statement*, 44 F.C.C. at 2308.

[32] *Id.* at 2316.

[33] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C. 2d 650, 679 (1971).

[34] FCC App. A at 22a (footnote omitted).

journalistic freedom consistent with its public obligations." [35] Last term, in *Midwest Video Corp.*, this Court reaffirmed "the policy of the Act to preserve editorial control of programming in the licensee . . . ." [36] Earlier, in *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474-75 (1940) this Court stated:

> "the field of broadcasting is one of free competition . . . . Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

The court of appeals nevertheless rejected the Commission's policy statement confirming the licensee's role, and found that format regulation was required in order to insure diversity in broadcast service.[37] The approach of the court of appeals is identical to the approach taken by the same court in *NCCB* v. *FCC*, which was re-

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[35] 412 U.S. at 110.

[36] 99 S. Ct. at 1444 (1979).

[37] At various places in its opinion, the court of appeals made its own intuitive factual findings at variance with the conclusions of the Commission. For example, although the Commission found that even formats that are generally characterized as the same are not necessarily substitutes for one another, 60 F.C.C.2d at 872-83, the court of appeals substituted its own "common sense" finding that "lovers of disco will switch to another disco station in preference to classical, all-news, country and western or the like." FCC App. A at—. In the words of the dissent:

> "[The majority] mounts untested assumption upon untested assumption to create a theory of regulation that may bear little resemblance to the actual functioning of the broadcast market. Only the Commission, equipped with investigatory tools and a well of experience, may predict in the first instance the behavior of listeners and broadcasters. The majority has simply substituted its views for the Commission's." FCC App. A at 55a (Tamm, J., dissenting).

versed by this Court.[38] There, the court of appeals held that the Commission had acted improperly in "grandfathering" certain newspaper-broadcast station combinations because the Commission's statutory obligation to promote diversity in broadcasting precluded the continued existence of such combinations. This Court concluded that the court of appeals had overstepped its authority because the determination of what action should be taken to encourage diversity in broadcasting was for the Commission, not the court of appeals, to decide.

In their minority opinions in this case, three judges of the court of appeals correctly concluded that the majority's rejection of the Commission's radio format policy —in Judge Tamm's words—"disregards the Commission's expert knowledge and, in so doing, violates the [Supreme Court's] mandate of *FCC* v. *National Citizens Committee for Broadcasting*." [39]

II. THIS COURT SHOULD ALSO GRANT REVIEW BECAUSE THE COURT OF APPEALS HAS DECIDED AN IMPORTANT CONSTITUTIONAL ISSUE, AND ITS DECISION IS AT VARIANCE WITH THE FINDINGS OF THE AGENCY AND WITH A DECISION OF THIS COURT.

The court below failed to offer more than passing reference to the constitutional issues presented by its decision, much less articulate any basis for concluding that the regulation it required was consistent with the First Amendment.[40] Judge Bazelon, in his concurring

[38] *FCC* v. *NCCB*, 436 U.S. 775 (1978).

[39] FCC App. A at 56a (Tamm, J., dissenting); *see* FCC App. A at 41a n.4 (Bazelon, J., concurring).

[40] The court's discussion of the constitutional issue consists entirely of its statement that in *WEFM* "although we did not explicitly address the constitutional implication of our decision, the constitutional issue was commented upon" by Judge Bazelon (FCC App. A at 33a); its statement that the Commission should adopt

opinion below, pointed out that while the majority "acknowledges the 'sensitive First Amendment implications' of government oversight of format choice," it "fails to grapple seriously with the constitutional implications of its decision." [41]

The Commission in its opinion concluded that program format regulation "would be . . . unconstitutional as impermissibly chilling innovation and experimentation in radio programming." [42] Similarly, on reconsideration the Commission explained: "[W]e were firmly convinced, that the regulatory policy outlined in *WEFM* represented a serious departure from the policies which we believe are required by . . . the First Amendment." [43] Three judges of the court of appeals agreed that court-ordered format regulation created substantial First Amendment concerns.[44] These concerns arise because, in the present situation, unlike in applications of the Commission's fair-

procedures to minimize First Amendment problems (FCC App. A at 31a); and its determination that the Commission "has provided little or no evidence that *WEFM* has in fact deterred licensees' format choices." (FCC App. A at 25a).

[41] FCC App. A at 42a (Bazelon, J., concurring) (footnote omitted). The court's failure to consider the constitutional issues may be attributable to the fact that the decision under review merely reiterated its earlier decision in *WEFM*. What the court failed to note was that at the time of *WEFM*, the constitutional issues had been neither briefed nor argued.

[42] 60 F.C.C. 2d at 865-66. The Commission was convinced that regulation of program formats would produce "an unnecessary and menacing entanglement in matters that Congress meant to leave to private discretion," and would raise serious constitutional questions "because 'a comprehensive, discriminating, and continuing state surveillance would inevitably be required to ensure that these restrictions are obeyed.'" 60 F.C.C.2d at 865, *quoting Lemon* v. *Kurtzman*, 401 U.S. 602, 619-20 (1971).

[43] 66 F.C.C. 2d at 79.

[44] FCC App. A at 48a n.8 (Tamm, J., dissenting); FCC App. A at 42a (Bazelon, J., concurring).

ness doctrine, the licensee is not afforded the latitude to make its own program judgments and to select its own programming.

In rejecting the findings of the Commission, the decision of the court below is completely at odds with this Court's decision in *CBS* v *DNC*. In that case, this Court made clear that careful consideration must be given to the determinations of the Commission in this special constitutional area,[45] stating that, in evaluating First Amendment claims, "we must afford great weight to the decisions of Congress and the experience of the Commission." [46] The form of regulation at issue in this case is surely as intrusive as that presented in *CBS* v. *DNC*, and would draw the Commission just as deeply into supervision of programming.[47] Because the dangers of regulation are equally stark here, there is equal reason for this Court to defer to the Commission's findings.

The Commission's findings strongly support its view that the regulation mandated by the court of appeals would not be consistent with the First Amendment.

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[45] The Court said:

> "Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For, during that time, Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned." 412 U.S. at 102.

[46] *Id. See also Pacifica*, 438 U.S. at 761-62 (Powell, J., concurring).

[47] For example, Commissioner Robinson saw serious constitutional problems arising from the *WEFM* policy because the Commission "will have 'to oversee far more of the day-to-day operation of broadcasters' conduct' than even would have been the case with mandatory access editorial advertising, a reason of apparently constitutional stature in the Supreme Court holding in [*CBS* v. *DNC*]." 57 F.C.C.2d at 600.

First, the Commission correctly found that format regulation would require routine intervention into licensee programming decisions. As Judge Bazelon observed, "regulation of entertainment formats is not content neutral. The regulator is inevitably led to favor some forms of expression over others." [48] Although the court of appeals attempts to minimize the extent of this intrusion into licensee discretion by noting that the Commission need intervene only when "there is strong prima facie evidence that the market has in fact broken down," [49] this standard would be satisfied whenever there is an indication that a format is "unique" and there is significant "public grumbling" about the proposed change,[50] even if, as may often be the case, the "grumblers" are not representative of a large segment of the audience. Moreover, the Commission's supervision will not be limited to situations where a format change is proposed by an assignee, but will extend to situations where some community group believes that the licensee has wrongfully changed its format without Commission approval.[51]

Second, the Commission correctly found that format regulation would necessarily require application of subjective and elusive standards that would exert an unduly chilling effect. For example, determining the "uniqueness" of a format entails deciding whether the community's need for "beautiful" music is satisfied by "popu-

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[48] FCC App. A at 42a. (Bazelon, J., concurring) (footnote omitted).

[49] FCC App. A at 24a.

[50] *Citizens Comm. to Keep Progressive Rock* v. *FCC*, 156 U.S. App. D.C. 16, 24, 478 F.2d 926, 934 (1973).

[51] *Notice of Inquiry*, 57 F.C.C. 2d at 596. (Concurring Statement of Commissioner Robinson). *See also Georgetown University*, 66 F.C.C. 2d 944 (1977). As noted above, note 13, *supra*, the logic of the decision suggests that applicants proposing unique formats might have to be preferred over existing licensees broadcasting conventional formats where there was a significant demand for such a format.

lar standard" fare,[52] or whether its demand for "laid back" music is met by providing "bubblegum rock."[53] By engaging in format regulation the Commission would be required to make a variety of unguided judgments in the area of taste. Indeed, the Commission found that it had no rational basis for determining which entertainment program formats would better serve the public interest.[54] As this Court ruled in *FCC* v. *NCCB*, "[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds."[55]

Third, the Commission correctly found that the vagueness of any regulatory policy involving monitoring of program formats, together with the exhaustive nature of the hearing process, would operate to chill the incentive of licensees to experiment with new forms of programming. Indeed, the Commission found that licensees would hesitate to modify their formats in any way for fear of incurring the consequences of a challenge.[56] The court of appeals fails to come to grips with this finding, but

[52] *See SRD Broadcasting, Inc.*, 57 F.C.C. 2d 354 (1975).

[53] Renewed Motion for Stay and Motion for Stay of Citizens Comm. to Save Jazz Radio at 3-4, *Riverside Broadcasting Co.*, No. BTC 7817 (FCC, filed Sept. 14, 1976). These are not atypical problems. In *WEFM*, the court required a hearing on whether or not a "fine arts" station adequately served the "classical" music lovers of Chicago. The court also suggested that a classical station playing Bach, Mozart, Brahms, and Beethoven might well have a different format from one offering Stravinsky, Copland, Bartok, and Bernstein. 165 U.S. App. D.C. at 203-04, 506 F.2d at 264-65.

[54] 60 F.C.C.2d at 864.

[55] 436 U.S. at 796-97, *quoting* 555 F.2d at 961.

[56] "Under the threat of a hearing that could cost tens or hundreds of thousands of dollars, many licensees might consider the risk of undertaking innovative or novel programming altogether unacceptable." 60 F.C.C.2d at 865.

suggests only that the Commission "provided little or no evidence that *WEFM* has in fact deterred licensees' format choices . . . ."[57] Of course, as this Court has often recognized, it is extremely difficult to marshall concrete evidence that regulation contrary to the First Amendment has chilled freedom of expression.[58] The Commission's expert finding in this area is entitled to great weight.

The court below appeared to conclude that "the Commission's fears appear somewhat less than realistic" because a mere handful of format cases has reached the court of appeals and that, in each of the three where the court held that a hearing was required, the controversy was ultimately settled by the parties.[59] The very fact that broadcasters feel compelled to settle cases in order to avoid the burden of the hearing suggests that the Commission's conclusion as to the chilling effect of such regulation is well founded.

Fourth, the Commission correctly found that format regulation would accord inadequate protection to the First Amendment rights of major segments of the listening audience. For example, the court of appeals would apparently accord little significance to the listening preferences of those who would prefer the programming proposed by the licensee. The Commission appropriately found that such an approach would impermissibly favor the interests of those preferring an existing station

[57] FCC App. A at 25a.

[58] As this court said in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963): "It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments." *See generally Buckley* v. *Valeo*, 424 U.S. 1, 41 n.48 (1976); *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-87 (1965); *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). Moreover, when the Commission compiled its record in the proceeding below, the *WEFM* decision was relatively recent. Its ultimate deterrent effect on format changes may not yet have been felt.

[59] FCC App. A at 19a.

service.[60] As the record shows[61] and as the Commission found,[62] many listeners identify with a station's programming for reasons other than its format, such as the personality of the broadcast personnel or the particular selections of music within the format. Moreover, format regulation accords influence over a licensee's format to those segments of the community most vocal in asserting their listening preferences.[63] The size of this complaining group—*i.e.*, the "significant public grumb[lers]"[64]—simply may not accurately reflect true demand for the abandoned format, much less suggest a breakdown in the market.[65]

As with many constitutional issues, balancing the factors involved in format regulation requires predictive judgments, based on assumptions concerning future actions of those affected. Where, as here, the expert agency selected by Congress has concluded that its *own* regulation would conflict with the First Amendment, the court of appeals should not lightly reject that finding.[66] Review is warranted because the court of appeals has intruded into a sensitive First Amendment area and has not accorded the Commission's judgments the weight due those of the expert agency, as required by decisions of this Court.

[60] 66 F.C.C. 2d at 85.

[61] J.A. 444-45.

[62] 60 F.C.C. 2d at 863.

[63] *See* 66 F.C.C. 2d at 85.

[64] *Progressive Rock*, 156 U.S. App. D.C. at 24, 478 F.2d at 934.

[65] B. Owen, Radio Station Format Changes, Diversity, and Consumer Welfare at 7 (J.A. 443).

[66] *FCC* v. *NCCB*, 436 U.S. at 813-14.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

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November 26, 1979

APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 3(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(h), provides:

> " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Section 303(g) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(g), provides:

> "Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

Section 308 of the Communications Act of 1934, as amended, 47 U.S.C. § 308, provides:

"(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: *Provided*, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: *Provided further*, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of

the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 35 of this title."

Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a), provides:

"(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d) provides:

> "(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), provides:

> "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
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> (1) bona fide newscast,
>
> (2) bona fide news interview,

> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, provides:

> "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

Section 402(b) of the Communications Act of 1934, as amended, 47 U.S. § 402(b), provides:

> (b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.